

**From:** Frank Vitello  
**To:** Microsoft ATR  
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**Subject:** Microsoft Comments

Ms. Renata B. Hesse  
Antitrust Division  
U.S. Department of Justice  
601 D. Street, N.W.  
Suite 1200

Washington, DC 20530-0001

Re: Comments on the Microsoft Proposed Settlement Agreement

Dear Ms. Hesse:

This will serve as the comments of Defenders of Property Rights on the settlement agreement that the Department of Justice has proposed in its antitrust litigation with the Microsoft Corporation. Settlement of the litigation with Microsoft is in the best interest of all parties involved to avoid prolonging a questionable case, which seemed to be initiated more with the anticipated remedy of a multi-million dollar settlement as an objective than sound antitrust policy. Moreover, as our comments below discuss, settlement of this litigation is in the public interest.

Settlement of This Lawsuit Will Bring to An End A Lawsuit That Was At Odds With The Constitution's Protections of Intellectual Property.

When the Constitution was ratified, the framers highlighted the importance of protecting intellectual property rights. In Article I, Section 8, the Constitution authorizes Congress to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. Const. art. I, § 8.

Moreover, all property rights, including that of intellectual property, were given further protection by the Fifth Amendment to the U.S. Constitution, which states: "no property shall be taken for public use, without just compensation." U.S. Const. amend. V. The purpose of the Fifth Amendment is to ensure that property owners have the right to possess, use and profit from their property, whether that property is tangible in the form of a family farm, or intangible in the form of a computer operating system. There is no question that a bulk of Microsoft's vast assets is comprised of intangible intellectual property, commonly known as patents, copyrights, trade secrets, brand names, market presence and intellectual know-how. In its zeal to enforce the antitrust laws, however, the Justice Department has apparently forgotten the Constitution protects all forms of property, including Microsoft's intellectual property.

Antitrust Enforcement Should Enhance, Not Undermine The Constitutional Protections of Intellectual Property.

In its antitrust litigation with Microsoft, the Justice Department has proposed that Microsoft be broken into smaller pieces or that Microsoft should be forced to fully or partially relinquish its intellectual property rights to competitors. In addition, the Justice Department has suggested that Microsoft be forced to disclose its "source code," or the software

blueprint for its operating system, Windows, which some consider to be the "crown jewel" of the software industry. Such disclosure would allow competitors to gain access to immediate updates on the Windows system so they can also release their updated software at the same time that Microsoft releases a new Windows version.

Since competitors, on average, usually release a new product a year after Microsoft releases a new Windows version, the government's plan would preclude Microsoft from, for a limited time, profiting exclusively from the fruits of its labor and investment -- which strikes at the heart of the free-market economy. If the government were to have its way, not only would it be destroying the free-market principles on which this country is based, but it would also be taking private property for public use, without payment of just compensation, contrary to the Fifth Amendment's guarantees. See *Kimball Laundry v. United States*, 338 U.S. 1, 3-4, 11 (1949) (holding that loss of intellectual property -- skilled management, good will and advertising -- was taken and just compensation due: "[T]he intangible acquires a value . . . no different than the value of the business' physical property.").

Microsoft has indeed been successful in the use of its intellectual property rights. However, Microsoft entered the industry thirteen years ago, when computer software and related technological investments were risky financial undertakings. As such, Microsoft earned its wealth as a result of its original ideas and innovative technological breakthroughs in the computer software industry. Thus, by virtue of the patent and copyright laws, the reward to Microsoft for the creation of its intellectual property rights has already been weighed against the rights of its competitors. To force Microsoft to give up its hard-earned property rights, and the reward resulting therefrom, is not the valid enforcement of antitrust laws, but an uncompensated taking of private property.

In short, the Microsoft antitrust litigation has posed various legal and constitutional barriers for the government. Defenders of Property Rights applauds the current administration in its efforts to put an end to the lawsuit. We agree that now is the time to foster the growth of American companies and to encourage the innovative, entrepreneurial spirit of Americans, and not to continue to selectively pursue the innovators of our country, at all costs -- at the expense of the economy, the consumer and our Constitution. In sum, Defenders strongly encourages the Justice Department to approve the proposed settlement agreement and finally put an end to its case against Microsoft.

Yours truly,  
Nancie G. Marzulla

President, Defenders of Property Rights

Frank A. Vitello  
Defenders of Property Rights  
1350 Connecticut Ave., NW, Ste. 410

Washington, DC 20036  
202. 822.6770  
Toll Free: 866. 630.9787  
202. 822.6774 facsimile  
[www.yourpropertyrights.org](http://www.yourpropertyrights.org)